PERBADANAN KEMAJUAN NEGERI PERAK

v.

ASEAN SECURITY PAPER MILL SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
PEH SWEE CHIN J
[CIVIL SUIT NO. 22-30-90]
27 MAY 1991

ARBITRATION: *Contract - Arbitration clause - Delay in project - Questions of fact - Triable issues - Whether matter should be referred for arbitration prior to filing action in Court - Stay.*

The parties had entered into a contract for the building of a paper mill for the manufacture of high-quality security paper. It was agreed by the defendant that the project would be fully completed by 31 January 1990. By a supplemental agreement, the parties agreed to extend the time on the grounds of fire, acts of war, etc. Both the agreements contained an arbitration clause in the event of a dispute.

The project was delayed and the defendant sought to justify the delay on the basis of a fire and further, that vacant possession of site was given after a year's delay. The plaintiff replied that the fire affected only a wooden store and denied that there was any delay in delivering possession of the site to the defendant.

The plaintiff rescinded the contract and filed an action for recovery of the land under O. 81 Rules of the High Court 1980. The defendant resisted the action, alleging that the matter should be firstly referred to arbitration. The plaintiff maintained that there was no dispute for arbitration; alternatively, that there was no triable issue for arbitration.

Held:

[1] On an examination of the facts and evidence, the issues raised before the Court were questions of fact and not law.

[2] The weakness of the defendant's case is not the sole criterion or indeed any criterion for brushing aside an arbitration agreement to which the plaintiff was a party and which was being insisted on by the defendant.

[Defendant's application for stay allowed.]

Cases referred to:

London & North Western Rly v. Jones [1915] 2 KB 35
Martin v. Selsdon (No. 2) [1950] 67 RPC 64
Willerford v. Watson [1873] 8 Ch 473

Legislation referred to:

Rules of the High Court 1980, O. 81

For the plaintiff - W.S.W. Davidson; M/s. Azman, Davidson & Co.
For the defendant - Ranjit Singh; M/s. Ranjit Singh & Co.

JUDGMENT

Peh Swee Chin J:

Amidst considerable fanfare from the mass media, an Asean project, a mill for the manufacture of high-quality security paper was set up in the industrial area in Lumut, with a great deal of prestige to Malaysia in general and Perak in particular, in the beginning of 1987. The project

by the beginning of 1990, seemed to be in shambles hence the action was filed by the Perbadanan Kemajuan Negeri Perak (hereafter called the plaintiff), (which agreed to provide 15 pieces of industrial land (hereafter called the said lands) for the project to the project company, called the Asean Security Paper Mill Sdn. Bhd. (hereafter called the defendant)), against the defendant, which was, according to plaintiff's allegations, totally responsible for the sorry state of the project.

The plaintiff promptly, after service of the writ, filed an application under O. 81 of Rules of High Court for judgment for the return of the 15 pieces of land and consequential directions, and the defendant also promptly filed an application for stay of all proceedings pending reference to arbitration and opposed the plaintiff's application aforesaid at the same time.

A modicum of background facts would be obviously necessary to be set out here, leading to the filing of the action.

By an agreement made on 16 January 1987 the plaintiff agreed to sell and the defendant agreed to purchase the said lands for the price of RM3,844,954.08 out of which a sum of RM158,673.05, being deposit, was paid in a certain manner with the balance in the sum of RM3,646,281.03 to be paid or satisfied by the issue by the defendant to the plaintiff of 5% cumulative participating preference shares in the defendant, credited as fully paid up and redeemable on certain terms.

Inter alia, the defendant agreed to erect, complete and commission the paper mill by 31 January 1990.

By a supplementary agreement of even date, *inter alia*, both parties reaffirmed the date of 31 January 1990 aforesaid and stipulated for the delay on grounds of fire, acts of war etc., which would be permitted by compensating extension of time. The relevant ground in this case for the delay was a fire which took place subsequently.

Significantly, both agreements contained the same arbitration clause as follows:

> All disputes, differences and questions which may at any time arise between the parties hereto or their respective representatives or assigns touching or arising out of or in respect of this agreement or the subject matter thereof shall be referred to a single arbitrator. In case the parties cannot agree upon a single arbitrator then two arbitrators will be appointed one to be appointed by each party to the agreement in accordance with and subject to the provisions of the law relating to arbitration in Malaysia as may be in force from time to time.

The defendant alleged by way of justifying the non-construction of the actual paper mill, that vacant possession of the site for mill was delayed by the plaintiff for one year; this the plaintiff vehemently denied by showing among other things, photographs of huge expanse of vacant land with a half completed mainly wooden or plank structure said to be a store house of a sort. The defendant further alleged a fire of the store for which defendant said it was entitled to an extension of time, and to this, the plaintiff replied to the effect that the fire affected merely the wooden store, and no work on the construction of the mill had been carried out, and even building plans for the mill were not approved. The plaintiff had, through its officers, deposed to the repeated and numerous reminders to the defendant which, according to the plaintiff; did not merely drag its feet, but more often than not, stopped in its tracks in regard to the construction of the actual mill.

Defendant deposed to its willingness for arbitration now and at the commencement of proceedings for the proper conduct of the arbitration. The Court found no steps taken by the defendant in the proceedings except for filing an application for stay of proceedings

with a view to arbitration, opposing the application by plaintiff for summary judgment under O. 81 of the Rules of High Court at the same time. The validity of the arbitration clause was never disputed by anybody.

Learned Counsel for the plaintiff submitted that plaintiff was not against arbitration, but that there was no dispute for arbitration or there was no triable issue. He submitted on various facts which showed to the effect that the defendant was guilty of a great deal of inaction in regard to obligations on its part to be performed.

The Court was very much attracted by the argument of learned Counsel for the plaintiff and adjourned "CIV" with a view to doing speedy justice according to the facts of the case as presented to the Court, with the Court being acutely conscious at the same time of having to decide judicially as to whether to grant a stay with reference to arbitration; judicially, that is, what is right and fair, from the judicial trend in the cases rather than behoving itself to act as a Court of morals.

In the first place, in my view, the Courts' sensibility as regards the ouster of their jurisdiction, save in regard to the constitution's fundamental rights or liberties, should be dulled by arbitration which after all is provided by an Act of Parliament, that is, the Arbitration Act, for the very laudable purpose of resolving commercial disputes, bearing in mind at the same time that Courts have always more work than they can ever handle. Such being the case, it was no wonder that Selbourne, LC in *Willerford v. Watson* [1873] 8 Ch 473 at 480 said:

> If parties choose to determine for themselves that they will have a domestic forum instead of resorting to ordinary Courts, then ... the Act of Parliament ..., a *prima facie* duty is cast upon the Courts to act on such agreement.

Bearing in mind the said duty cast, in exercising my discretion as to stay of proceedings, how should then one view the plaintiff's contention that there was no triable issue. Here we were cornered with questions of facts, involving not at all either difficult question of law or on different construction of the 2 agreements in question. The nearly total absence of these no doubt prompted the plaintiff to say that there were no triable issues.

The issues raised by the defendant were issues of facts that could clearly be tried and the foregone conclusion on the merits as clearly contended for in the submission of learned Counsel for the plaintiff was quite understandable and with a fair amount of justification, no doubt. But this was not really similar to a mere refusal to pay on an undisputed claim so as to amount to an absence of dispute, please see *London & North Western Rly v. Jones* [1915] 2 KB 35. Neither was the instant case one involving question of law or proper construction of the agreements, such that recourse appropriately should be to a commercial Court instead of arbitration, please see *dictum* of Evershed MR in *Martin v. Selsdon* (No. 2) [1950] 67 RPC 64 at p. 69. Weakness of defendant's case should not at all be a sole criterion or indeed any criterion at all for brushing aside an arbitration agreement to which the plaintiff was a party, and which was being insisted on by the defendant.

I therefore granted a stay of proceedings in terms of "encl. 14" for reference to arbitration and made no order on "encl. 10" for summary judgment under O. 81 of the Rules of High Court. Costs of both applications were to abide by an order of the arbitrator to be appointed.

Also found at [1991] 2 CLJ 1584